No. 89-5961

In The

# Supreme Court of the United States

October Term, 1990

ROBERT LACY PARKER,

*Petitioner,*

v.

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida,

*Respondents.*

## REPLY BRIEF OF PETITIONER

ROBERT J. LINK
PAJCIC & PAJCIC, P.A.
2800 Independent Square
Jacksonville, Florida 32202
(904) 358-8881

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued





TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued



OTHER AUTHORITIES





TABLE OF AUTHORITIES – Continued

## INTRODUCTION

Citations to the Joint Appendix are designed (J.A. ___). Citations to the trial transcript are designed (T.___). Citations to the state trial proceedings, called Record on Appeal, are designed (R.___). Citations to Petitioner's Brief are designed (P.B.___). Citations to the Respondent's Brief are designated (R.B.___). Emphasis is supplied unless otherwise noted.

## STATEMENT OF THE CASE

The State grounds its entire brief on "the facts as reported by the Eleventh Circuit" (R.B.3), which it sets forth *verbatim*. The Eleventh Circuit explicitly took this version of the facts from the trial judge's sentencing order (J.A.147). For several reasons, the facts recited in the trial judge's sentencing order are an inappropriate starting point for constitutional analysis in this case.

*First*, Petitioner's Argument I in this Court (P.B.15-35), invokes the three-step process of constitutional review endorsed in *Lewis v. Jeffers*, 110 S.Ct. 3092 (1990), in challenging the standards applied by the Florida Supreme Court to uphold his death sentence despite a jury recommendation of life. Petitioner's argument is that:

> (1) The *Tedder* standard – the Florida Supreme Court's crucial test for approving or disapproving death sentences based on a "jury override" [see *Spaziano v. Florida*, 468 U.S. 447, 465-66 (1984)] – violates the constitutional rule of *Maynard v. Cartwright*, 486 U.S. 356 (1988), *unless* it is saved by the Florida Supreme Court's limiting construction which requires the appellate court to examine the record and determine whether there is any "reasonable basis" for the jury's life recommendation. *E.g.*, *Malloy v. State*, 382 So.2d 1190 (Fla.1979); *Richardson v. State*, 437 So.2d 1091, 1095 (Fla.1983).

(2) The trial judge and the Florida Supreme Court did not apply the limiting, "reasonable basis" construction in imposing and approving Petitioner's death sentence; thus, the sentence violates the rule of *Godfrey v. Georgia*, 446 U.S. 420 (1980).

(3) Petitioner's death sentence *could* not be approved on this record under the "reasonable basis" construction without offending the "rational factfinder" test of *Lewis v. Jeffers, supra*.

Because the "reasonable basis" construction of *Tedder* focuses on the inquiry whether there is a reasonable basis in the record for the jury's life recommendation, and *not* upon the view of the facts taken by the trial judge in his sentencing order (see cases cited at P.B.21, 28-9), the starting point for adjudicating these constitutional issues cannot possibly be the factual findings made in Judge Olliff's sentencing order. See, most recently, *Cheshire v. State*, ___ So.2d ___, 15 FLW S504 (Fla.1990), re-affirming the "reasonable basis" test and noting that " . . . under *Tedder* the trial court's role is solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending life imprisonment." Notably, the State's brief nowhere questions Petitioner's description of the Florida case law establishing the "reasonable basis" construction; it nowhere suggests that a "reasonable basis" analysis begins – let alone ends – with the trial judge's sentencing findings; and it nowhere offers any *other* narrowing construction of the *Tedder* rule than the "reasonable basis" construction.

*Second*, the Florida Supreme Court, on direct appeal, did not treat the facts of the case as settled by the trial judge's sentencing order. It recited its own, more accurate summary of the facts (J.A.64-65). Indeed, it specifically rejected portions of the trial judge's sentencing order concerning two aggravating circumstances (J.A.70-71).

*Third*, the trial judge's sentencing order is replete with plain factual errors. Not only the Florida Supreme



Court, but the federal District Court as well found it necessary to provide a summary of the facts that differs substantially from those recited in the sentencing order (J.A.93-99). One glaring error is the trial judge's description of the Padgett homicide:

> The three men exited the car and Padgett fell to his knees and begged mercy. Groover shot Padgett to death as Parker aided and abetted the murder. (J.A.40).

Nowhere in the trial record is there any testimony, physical evidence, or argument that Padgett fell to his knees and begged for mercy before Groover shot him. The only direct testimony as to how Padgett was killed was provided by Robert Parker himself. Parker did not see what position Padgett was in at the time that he was shot, and no one testified that Padgett fell to knees and begged for mercy. The uncontradicted evidence was that Parker was sitting in the car at the time that Padgett was shot by Groover. Parker testified that he heard a shot, got out of the car, and saw Groover standing over Padgett's body with a gun (T.1844-5). Groover told Parker to back off, and Parker got back into the car (T.1845-6). Indeed, the evidence tended to show that Padgett did *not* know he was going to be killed (T.2476-7, 2496). The Florida Supreme Court ruled that this evidence was sufficient to convict Parker of felony murder in the Padgett homicide, because he assisted in a kidnapping. *Parker v. State*, 458 So.2d 750, 752-3 (Fla.1984). Nevertheless, Judge Olliff repeated the lurid "begging for mercy on his knees" description several times (J.A.40, 49, 59, 60). In describing the Padgett murder at another point, Judge Olliff wrote, "he endured threats with a loaded pistol, physical beating and abuse, and went through tortuous hours before he was finally shot in the head by the Defendant." (J.A.58). This is as fanciful a description as the statement that Padgett fell to his knees and begged for mercy. No one has ever contended that the Defendant Robert Parker shot Richard Padgett, yet the trial court made such a finding at one point in its sentencing order. Despite the

State's argument that Padgett was not killed for money, but was killed because Groover and Parker were afraid of Padgett's relatives[1] (T.2130-1), the trial court judge found that "the only reason for this murder was the non-payment of a drug debt." (J.A.60).

Another glaring error is found in the description of the Dalton homicide. The sentencing order states that the Dalton homicide was the result of a plan between Groover and Parker, states that Dalton "begged for mercy," and indicates that her murder was premeditated by the Defendant Robert Parker (J.A.40-1, 49, 53). The judge's order essentially tracks Joan Bennett's testimony concerning the Dalton homicide, yet the jury clearly rejected her testimony in acquitting the Defendant of first degree murder. The trial court judge completely ignored the jury's finding that Robert Parker was not guilty of premeditated murder in the death of Jody Dalton.

Not only were the "facts" as alleged by Judge Olliff in his sentencing order not accepted by the Florida Supreme Court or the District Court judge, it is clear that they were also not accepted by the jury that heard the evidence. To elevate the trial judge's sentencing order to the status of the "facts of the case" is to give it weight that was never intended or anticipated. The purpose of the sentencing order is to state the aggravating and mitigating circumstances found by the trial court so that the Florida Supreme Court can intelligently review the sentence. Section 921.141, Florida Statutes (1981). Even a cursory review of the trial transcript shows that the findings made by the trial court in its sentencing order are not fairly supported by the record.

---

[1] This argument was necessitated by evidence that Padgett's wallet containing $16 was found on his body (T.1117-8).



## ARGUMENT I

## THE STANDARDS USED BY THE FLORIDA SUPREME COURT TO APPROVE OR DISAPPROVE A DEATH SENTENCE IMPOSED BY A TRIAL JUDGE DESPITE A JURY'S RECOMMENDATION OF LIFE ARE SUBJECT TO EIGHTH AMENDMENT REVIEW; AND THE AFFIRMANCE OF PETITIONER'S DEATH SENTENCE WAS BASED UPON AN UNCONSTITUTIONAL APPLICATION OF THOSE STANDARDS.

Respondents take the position that the standards used by the Florida Supreme Court to approve or disapprove a death sentence are simply matters of state law not subject to federal review under the Eighth and Fourteenth Amendments (R.B.20). This argument stems from an apparent misunderstanding of this Court's holding in *Spaziano v. Florida,* 468 U.S. 447 (1984) (R.B.23-6). The State's interpretation of *Spaziano* was shared by neither the District Court judge (J.A.140, n.29), nor by the Eleventh Circuit Court of Appeals:

> The Court's conclusion that Florida's override scheme is constitutional did not end its inquiry. Procedures that result in the constitutional application of the death penalty if followed correctly may result in the unconstitutional application of the death penalty if followed incorrectly. The Court therefore examined the record of the particular case before the Court and concluded that the application of Florida's scheme did not result in the arbitrary or discriminatory application of the death penalty. See, *id.*, at 466, 104 S.Ct. at 3165 ("We see nothing that suggests the application of the jury override procedure has resulted in the arbitrary or discriminatory application of the death penalty, either in general *or in this particular case*") (J.A.156).

This Court in *Spaziano* clearly went beyond a simple examination of the constitutionality of Florida's jury override scheme per se, and examined the application of the jury override scheme to the facts of the case before it.

Robert Parker's position before this Court is consistent with this Court's decision in *Spaziano,* not foreclosed by it.

The Respondents' contention before this Court is that a jury override death sentence, once approved by the Florida Supreme Court, is insulated from further federal review, no matter how arbitrary, capricious, or discriminatory the decision. The State's reliance on this extreme position points out the weakness of its case if the application of the *Tedder* standard to Mr. Parker's case is subjected to federal review. The Respondents cite *Lewis v. Jeffers,* 110 S.Ct. 3092 (1990), as if it supports their contention that the standards used by the Florida Supreme Court to approve death sentences are not subject to federal review (R.B.22-3). However, applying *Lewis v. Jeffers* to Mr. Parker's case would require that the death sentence be vacated. In *Lewis v. Jeffers,* this Court held, contrary to the Respondents' assertion here, that a State's standard governing the imposition of a death sentence is subject to federal review in one of three ways: (1) where the standard is unconstitutionally vague on its face and has not been construed by the state court in a constitutionally narrow construction, as in *Maynard v. Cartwright,* 486 U.S. 356 (1988); (2) where the state court has adopted a constitutional construction of the standard, but fails to apply that construction to the facts of the individual case, as in *Godfrey v. Georgia,* 446 U.S. 420 (1980); and (3) where the state court has adopted a constitutionally narrow construction of the standard and has applied that construction to the facts of the particular case, but no rational trier of fact could have found the standard applicable based upon the evidence in the record. *Lewis v. Jeffers,* at 3098-3104. The State makes no contention that the standard used by the Florida Supreme Court to review a jury override death sentence[2] is not unconstitutionally vague

---

[2] . . . "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder v. State,* 322 So.2d 908, 910 (Fla.1975)



on its face. The State makes no contention that the narrowing construction of the *Tedder* standard developed in *Richardson v. State,* 437 So.2d 1091, 1095 (Fla.1983) – the "reasonable basis" test – was in fact applied by the Florida Supreme Court in this case.[3] The State further makes no contention that this case does not fall into the *Lewis v. Jeffers* category two described above. Instead, in apparent recognition of the weakness of their position if the application of the *Tedder* standard in this case is subjected to federal review, Respondents argue solely that there can be no federal review.

Respondents' argument is belied by *Godfrey v. Georgia, Maynard v. Cartwright, Lewis v. Jeffers,* and *Clemons v. Mississippi,* 110 S.Ct. 1441 (1990). Of course, federal review is limited to federal constitutional error. That is the holding of *Gryger v. Burke,* 334 U.S. 728 (1948), quoted extensively at R.B.21-22; Petitioner has no quarrel at all with *Gryger.* Both the limits of federal review and its legitimacy within those limits were thoroughly discussed in *Lewis v. Jeffers, supra.* Petitioner seeks exactly the sort of review described in *Jeffers,* nothing more or less.

Apparently as an aside, the Respondents assert that the mitigating evidence in Robert Parker's case was "de minimus." The State asserts that Parker "enjoyed a normal childhood." Presumably, it is normal for a child to grow up in a home with an alcoholic father who beats his mother in his presence, and encourages him to drink from the time he is old enough to walk. Presumably, it is a normal childhood for a boy to be forced to drop out of high school at the age of 16 because his adult girlfriend is pregnant. Presumably, it is normal for an older woman to encourage a 14 year old boy to use drugs to the extent that the boy is addicted by the age of 16. The Petitioner

---

[3] This is not surprising, because the Florida Supreme Court makes no mention of any "reasonable basis" analysis, nor does it perform any "reasonable basis" analysis in its opinion (J.A.71-2).

sincerely hopes that the majority of children in this country do not have such "normal" childhoods. Equally incongruous is the State's apparent contention that the uncontroverted evidence of intoxication (a possible statutory mitigating circumstance), as well as the fact that the triggerman received a plea bargain to a lesser sentence while Robert Parker received a death sentence despite the fact that he personally killed no one, were "de minimus" mitigating factors. Such factors may appear de minimus to Respondents, but they were obviously considered significant by the jury. As demonstrated in Petitioner's initial brief, these mitigating circumstances have consistently been found to be sufficient to constitute a reasonable basis for a jury life recommendation prohibiting a jury override.

The State contends that the trial court's silence concerning non-statutory mitigating circumstances should not be interpreted as a failure to consider and weigh the non-statutory mitigating evidence. This argument ignores the admission by the Florida Supreme Court in *Downs v. Dugger*, 514 So.2d 1069 (Fla.1987), to the effect that the state supreme court did not require the judge or jury to actually weigh non-statutory mitigating evidence, but only required that the defendant be permitted to present non-statutory mitigating evidence, before this Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). *Downs, id.*, at 1071. The State makes no effort to justify the Florida Supreme Court's pre-*Hitchcock* decisions in cases such as this one. Requiring a judge who wants to impose a death sentence to give any weight to uncontroverted mitigating evidence, especially non-statutory mitigating evidence, has been a continuing problem in Florida. See, *Waters*, "Uncontroverted Mitigating Evidence in Florida Capital Sentencings," *The Florida Bar Journal* (January 1989). The Florida Supreme Court has finally acted to correct this problem by establishing guidelines requiring a sentencing judge to expressly evaluate each mitigating circumstance proposed by the defense in a written order. *Campbell v. State*, ___ So.2d ___, 15 FLW S342 (Fla.1990).



The State likewise makes no attempt to explain or justify the aberrational application of the *Tedder* standard in 1984 and 1985, as described in *Cochran v. State*, 547 So.2d 928, 933 (Fla.1989). This is significant because the State suggests that death penalty sentencing schemes should be subject to federal review "only when they are of such a nature as *systematically* to render the infliction of a cruel punishment 'unusual.' " *Walton v. Arizona*, 110 S.Ct. 3047, 3066 (1990) (Scalia, J. concurring). Even applying this standard, it would appear that the aberrant review of jury overrides conducted by the Florida Supreme Court during 1984 and 1985, in combination with the Court's failure to require judges to give weight to non-statutory mitigating evidence, did indeed result in a systematic misapplication of Florida's death penalty at the time that Robert Parker's appeal was decided. As demonstrated by *Downs*, *Cochran*, and *Campbell*, these shortcomings have apparently been corrected. This prospective correction of the problem offers no relief for Robert Parker, however. Under these circumstances, federal review is not only permissible, it is necessary.

The weakness of the State's position on this issue is also demonstrated by its complete failure to attempt to explain why reversal is not mandated under *Clemons v. Mississippi*, 110 S.Ct. 1441 (1990). The State makes no attempt to reconcile the Florida Supreme Court's review of Robert Parker's death sentence in this case with this Court's ruling in *Clemons*, because it cannot be reconciled.

To reiterate, Respondents take the extreme position that the application of the *Tedder* standard by the Florida Supreme Court is not subject to federal review under the Eighth or Fourteenth Amendments. This position is an implicit recognition that, if a *Lewis v. Jeffers* analysis is performed, reversal is mandated. Respondents' apparent "fallback" position is to ask this Court to adopt Justice Scalia's concurring opinion in *Walton v. Arizona* as the standard for federal review of state court death sentences. Though Petitioner believes that reversal of his death sentence is required even under this standard, the

State is asking this Court to create new law and to ignore established precedent. In *Spaziano v. Florida*, this Court reviewed the *Tedder* standard as applied to the facts of that individual case. In *Lewis v. Jeffers*, this Court established a three step analysis of state court death penalty standards to determine their constitutional validity, both on their face and as applied. In *Clemons v. Mississippi*, this Court ruled that the Eighth Amendment prohibits the automatic affirmance of a death sentence simply because there are one or more remaining valid aggravating circumstances after other aggravating circumstances have been found improper. To uphold Petitioner's death sentence, the Respondent can only ask this Court to break new ground in death penalty jurisprudence. The desperation of Respondents' position points out the strength of Petitioner's. The death sentence here must be vacated.

## ARGUMENT II

## THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER'S CONSTITUTIONAL CLAIM AGAINST AN EVIDENTIALLY UNSUPPORTABLE FELONY MURDER CONVICTION WAS NOT PRESENTED TO AND DECIDED BY THE FLORIDA SUPREME COURT ON DIRECT APPEAL AND THAT, EVEN IF THE CLAIM WAS PROPERLY PRESERVED ON APPEAL, IT WAS PROCEDURALLY BARRED BY PETITIONER'S FAILURE TO RE-RAISE IT IN STATE POST-CONVICTION PROCEEDINGS.

Respondents' discussion of this issue evidences either a frightening ignorance of the trial record or a deliberate attempt to mislead the Court. Petitioner's Argument II applies only to Count II of the Indictment, the murder of Nancy Sheppard. Respondents discuss Petitioner's trial level request for a jury instruction on the "independent intervening act" defense to felony murder as if it was somehow related to Petitioner's defense to Count II (R.B.12-14). The independent act defense was not Petitioner's defense to Count II, but was the defense to Count I, the murder of Richard Padgett, and Count III,



the murder of Jody Dalton. Petitioner raised the issue of the trial court's failure to give the independent act instruction as a separate issue on direct appeal, which the Florida Supreme Court recognized had nothing to do with Petitioner's defense to the Sheppard murder (J.A.66-7). This fact was recognized not only by the Florida Supreme Court, but also by the District Court in its discussion of the denial of the independent act instruction (J.A.137-8). Likewise, the Eleventh Circuit recognized that the independent act instruction related to the Padgett murder, not the Sheppard murder (J.A.167-8). The trial court's failure to give the independent act instruction as a defense to the Padgett murder is not an issue before this Court, and has absolutely nothing to do with the sufficiency of the evidence to support a felony murder instruction in the Sheppard murder.

Despite the fact that the denial of an independent act defense instruction and the giving of a felony murder instruction that was unsupported by the evidence are two separate and distinct issues relating to two separate and distinct homicides, Respondents argue that the only issue raised before the trial court, the Florida Supreme Court, and the District Court, was the denial of the Petitioner's requested independent act instruction (R.B.12-15). The State then asserts that the *Stromberg*[4]/due process argument concerning the sufficiency of the evidence to support the felony murder instruction was raised for the first time in Petitioner's Eleventh Circuit brief (R.B.31). Despite Respondents' contention that the issue was not raised at trial, the record of the charge conference clearly demonstrates that defense counsel objected to the giving of the felony murder instruction on the grounds that it was not supported by the evidence (J.A.3-5). The record demonstrates that the State requested that the jury be instructed on the underlying felony of kidnapping as to the Padgett murder and robbery as to the Sheppard murder (J.A.3-5). Petitioner objected to the felony murder

---

[4] *Stromberg v. California*, 283 U.S. 359 (1931).

instruction as to both homicides, on the grounds that " . . . there is no evidence that there was a kidnapping or that there was a robbery in any of these murders." (J.A.4). The trial court recognized this objection several times during the charge conference and overruled it each time (J.A.5, 8, 10). On direct appeal, the Florida Supreme Court unequivocally found that the evidence was insufficient to support the robbery felony murder finding in the death of Nancy Sheppard (J.A.70-1).

The State argues that, on rehearing, Petitioner "did not argue any even remotely fashioned *Stromberg* theory." (R.B.30-1). A review of the motion for rehearing, however, clearly shows a discussion of the felony murder instruction as it applied to the Sheppard murder (J.A.81-3) in which the Petitioner summarized the problem as follows:

> This court, in page 6 of its own opinion, ruled that there was no felony involved in the Sheppard murder, and struck felony murder as an aggravating circumstance. *The lower court was therefore incorrect in instructing the jury on felony murder.* The State conceded in its brief that, under *Goodwin v. State*, 405 So.2d 170 (Fla.1981), duress *is* a defense to felony murder (S.B.6). The jury was therefore instructed in a legally incorrect and factually misleading matter in two critical areas relating to the Sheppard murder. Not only was the jury told that a lawful defense supported by the evidence was not a defense at all, *but they were permitted to convict the defendant on a theory of liability that was not supported by the evidence.* (J.A.82).

Petitioner went on to state that the appellate court's disposition of his case violated his constitutional right to due process of law, specifically citing his right to notice of the charges and an opportunity to defend against them. (J.A.83). The Respondents' assertion notwithstanding, the District Court found that "Petitioner's trial counsel clearly raised his objections" and that "the Florida



Supreme Court could not have overlooked the presence of these issues." (J.A.103).

Respondents make the further assertion that Petitioner did not make his *Stromberg*/due process claim in the U.S. District Court (R.B.31). In fact, the issue was raised as Petitioner's ground one in his habeas petition, and briefed in a memorandum of law filed concomitantly with it. In its order denying relief, the District Court judge discussed *Stromberg* at length, based upon Petitioner's arguments. (J.A.130-6). The District Court discussed this issue extensively on the merits, because it found that the law of procedural default concerning this claim was "unsettled." (J.A.102-4). Contrary to Respondents' assertion, the District Court noted that the *Stromberg* claim was raised in Petitioner's motion for rehearing of his direct appeal. (J.A.102).

In addressing the merits, Respondents claim that *Stromberg* only applies to cases involving "laws governing multiple activities, some of which were protected or not illegal." (R.B.34). The State apparently misinterprets *Stromberg* to require that the alternative theory be constitutionally protected, as opposed to simply unsupportable by the law or evidence. In *Yates v. U.S.*, 354 U.S. 298 (1957), this Court relied upon *Stromberg* to reverse a conspiracy conviction where the statute of limitations had run as to one of the two charged objectives of the conspiracy, and it was impossible to know which objective was the basis for the jury verdict. In *Mills v. Maryland*, 108 S.Ct. 1860 (1988), this Court cited *Stromberg* and *Yates* in support of the following proposition:

> With respect to findings of guilt of criminal charges, the Court consistently has followed the rule that the jury verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied on by the jury in reaching the verdict. *Id.*, at 1866.

The Eleventh Circuit has determined that *Stromberg* applies to situations in which an erroneous felony murder instruction is given. See, *Adams v. Wainwright*, 764 F.2d 1356 (11th Cir.1985). Other circuit courts have likewise concluded that liability need not be based on a constitutionally protected activity in order for *Stromberg* to be applicable. See, *U.S. v. Beasley*, 585 F.2d 796, 798 (5th Cir.1978) ("Where it is impossible to determine whether a jury verdict rested on permissible or impermissible considerations, a conviction based on that verdict must be reversed.").

However, even if *Stromberg* was interpreted as requiring one of the theories of liability to be unconstitutional as opposed to simply "unsupportable," *Stromberg* would be applicable in this situation. Under *Jackson v. Virginia*, 443 U.S.307 (1979), a conviction based on less than proof beyond a reasonable doubt is itself unconstitutional. Because the Florida Supreme Court has already determined that the evidence as to the robbery felony murder did not meet the reasonable doubt standard (J.A.70-1), a conviction based on that theory would be unconstitutional under *Jackson*. When a general verdict is based on two theories of liability, one of which is unconstitutional, the conviction violates *Stromberg*. That is precisely the situation here.

Respondents assert that a finding by the Florida Supreme Court that there was insufficient evidence to support the robbery felony murder aggravating circumstance is somehow different from a finding that the evidence was insufficient to support a conviction for robbery felony murder. The Eleventh Circuit has examined the issue of whether the felony murder aggravating circumstance in Florida's death penalty statute is identical to the felony murder offense under Florida law. In *Delap v. Dugger*, 890 F.2d 285 (11th Cir.1989), the court squarely held that they were identical: "We conclude that the felony murder aggravating circumstance is coextensive with a felony murder theory of prosecution." *Id.*, at 315.



The State in turn argues that "the mere rejection of robbery as an aggravating sentencing factor does not mean that no evidence (guilt phase) of felony murder was on the record." (R.B.36). This argument seems to suggest that Petitioner's conviction could have been based on an underlying felony other than robbery. Once again, Respondents' ignorance of the trial record is demonstrated. At the charge conference, it was determined by the trial court judge that the underlying felony upon which the jury would be instructed as to the Padgett murder was kidnapping, and the underlying felony that the jury would be instructed upon as to the Sheppard murder was robbery (J.A.8; R.388-90). The only underlying felony that was argued by the State to the jury as a theory of liability in the Sheppard murder was robbery (T.2274-5). Thus, the only underlying felony upon which Petitioner's conviction in the Sheppard murder could have been based was robbery.

The validity of Petitioner's claim on the merits is evident. Only if one accepts the distorted case history presented by Respondents can the procedural default ruling of the lower court be sustained. Petitioner's claim is neither procedurally barred nor devoid of merit, and requires a new trial on Count II.

## ARGUMENT III

**WHERE THE JURY WAS PERMITTED TO CONVICT PETITIONER OF FIRST DEGREE MURDER ON EITHER A FELONY MURDER THEORY OR A PREMEDITATED MURDER THEORY, THE COURT OF APPEALS ERRED IN HOLDING THAT THE AVAILABILITY OF THE LATTER THEORY MADE IT HARMLESS ERROR TO INSTRUCT THE JURY TO COMPLETELY DISREGARD PETITIONER'S DEFENSE TO FELONY MURDER.**

Respondents' brief fails to even address the propriety of the trial court giving its "duress is not a defense" instruction. Instead, the State's sole response is that duress is not a defense to felony murder:

> The State of Florida stands as one of the majority of jurisdictions which does not recognize "duress" as a defense to first degree murder. Even at common law "duress" was not recognized as a valid defense. (R.B.37).

Respondent cites LaFave, *Substantive Criminal Law*, Section 5.3 (West Publishing Company 1986), for this proposition. Contrary to Respondent's position, LaFave unequivocally states that duress *is* a defense to felony murder: " . . . duress is no defense to the intentional taking of life by the threatened person; but it is a defense to a killing done by another in the commission of some lesser felony participated in by the defendant under duress." LaFave, at 618. In another respected hornbook, Professor Rollin Perkins describes the State's position as follows: "*Another unsound suggestion, occasionally encountered*, is that compulsion cannot be recognized as an excuse in a prosecution for felony murder even if the defendant did not do the killing himself and joined others in their wrongdoing only to save his life." Perkins, *Criminal Law*, Ch.9, Sec.2(c) "Compulsion" (The Foundation Press, Inc. 1969). Significantly, both LaFave and Perkins refer to *People v. Merhige*, 212 Mich. 601, 180 N.W.418 (1920). The *Merhige* decision was also cited by the Florida appellate court in support of the proposition that duress can be a defense to felony murder. See, *Wright v. State*, 402 So.2d 493, 498-9 n.8 (Fla.3d DCA 1981).

The State's assertion that the duress instruction approved by the Florida Supreme Court in *Goodwin v. State*, 405 So.2d 170 (Fla.1981), related to a charge of kidnapping, not murder, is simply wrong. A review of the opinion shows that the defendant Goodwin was charged with three counts of first degree murder, *not* kidnapping. *Goodwin*, at 170. The jury in *Goodwin* was instructed that duress was a defense to kidnapping, which was the underlying felony in the three homicides. The Supreme Court in *Goodwin* noted that "the trial judge properly instructed the jury on the defense of duress . . . ," that



"the sole defense of the appellant was coercion and this was rejected by the jury," and, finally:

> There was an abundance of testimony as to the fear that appellant had of (co-defendants) Steinhorst and Hughes. Although the jury rejected this fear as coercion by its verdict of guilty, its recommendation of a sentence of life imprisonment could have indicated that the jury thought that fear had motivated appellant's participation in the tragic events. *Goodwin*, at 172.

Respondents' assertions to the contrary, a review of the opinion in *Hawkins v. State*, 436 So.2d 44 (Fla.1983), clearly discloses that it was a felony murder case wherein the defendant was permitted to assert a duress defense that was rejected by the jury:

> On the issue of his convictions, Hawkins asserts that none of his convictions are proper because he conclusively established that he acted under duress exerted by his co-defendant, Troedel. We disagree. The evidence was clearly sufficient for the jury to conclude that Hawkins acted *voluntarily* in participating in the burglary and robbery and the felony murders. In this state, when a person *voluntarily* participates in a robbery, that person is guilty of first degree felony murder when a killing occurs during a commission of that robbery even though he did not actually do the killing because 'the felony murder rule and the law of principles combine to make a felon generally responsible for the lethal acts of his co-felon.' (Citations omitted.) *Hawkins, id.*, at 46.

The Florida Supreme Court in *Hawkins* clearly stated that it is *voluntary* participation in an underlying felony that subjects a defendant to liability for a killing committed by a co-felon. The duress defense, of course, negates that "voluntary participation" element of felony murder.

Respondents cite no authority holding that duress is not a defense to felony murder. As shown in the *Goodwin* and *Hawkins* decisions, other defendants in other trial courts in Florida have been permitted to use duress as a

defense to felony murder. Nevertheless, Robert Parker's jury was instructed that duress was not a defense to any form of murder (R.320). The Petitioner was denied his right to present a defense, and is entitled to a new trial as to Count II.

## ARGUMENT IV

**PETITIONER WAS DENIED DUE PROCESS WHEN THE PROSECUTOR WAS PERMITTED TO CROSS EXAMINE HIM ABOUT THE FACT THAT HE HAD CONFERRED WITH DEFENSE COUNSEL DURING A RECESS IN HIS TESTIMONY, ALTHOUGH THE CONFERENCE HAD BEEN AUTHORIZED BY THE TRIAL JUDGE AND ALTHOUGH THE PROSECUTOR OFFERED NO GOOD FAITH BASIS FOR ASSERTING THAT IT INVOLVED ANY CONDUCT LEGITIMATELY RELEVANT FOR IMPEACHMENT.**

Respondents attempt to justify the cross examination of the Defendant with two arguments: (1) the trial court judge should not have permitted the Defendant to consult with counsel during a recess, and (2) "a defendant who takes the witness stand is in the same position as any other witness." (R.B.43). Respondents may be correct that the trial court judge would not have been obligated to permit Petitioner to talk with his lawyer during this recess, based upon this Court's decision in *Perry v. Leeke*, 109 S.Ct. 594 (1989)[5]. This contention is completely beside the point, however. Even if the trial court judge was mistaken in ruling that Petitioner had the right to confer

[5] At the time of Petitioner's trial, he unquestionably had an absolute right to consult with counsel during any recess in the trial. See, *Thompson v. State*, 507 So.2d 1074 (Fla.1987); *Bova v. State*, 410 So.2d 1343 (Fla.1982). *Perry* certainly does not stand for the proposition that a trial court may not permit a defendant to consult with his lawyer during a recess in the trial. Perry simply states that a trial court judge has the discretion to prohibit consultation during a very brief recess in the trial, while the defendant is on cross examination.



with his lawyer, the State is not permitted to take advantage of the judge's mistake by using against Petitioner his exercise of the right that the judge's ruling told him he had. See, *Johnson v. U.S.*, 318 U.S. 189 (1943). To permit the State to attack a defendant in this fashion would be the "indefensible sort of entrapment by the State," condemned in *Raley v. Ohio*, 360 U.S. 423, 426-7 (1959).

The State's second argument, that a defendant is like any other witness when he takes the witness stand, was rejected by this Court in *Geders v. U.S.*, 425 U.S. 80 (1976):

> The petitioner was not simply a witness; he was also the defendant . . . a non-party witness ordinarily has little, other than his own testimony, to discuss with trial counsel; a defendant in a criminal case must often consult with his attorney during the trial. *Id.*, at 88.

Respondents are apparently asking this Court to recede from its previous decisions that unequivocally reject the proposition that a defendant in a criminal case is like any other witness when he takes the witness stand. See, *Rock v. Arkansas*, 483 U.S. 44 (1987); *Doyle v. Ohio*, 426 U.S. 610 (1976). Respondents contend that it is impractical to require a prosecutor "to proffer some evidence of 'coaching' before being allowed to cross examine on that issue [because] . . . the State has no access to attorney-client communications and cannot listen in on their conferences" (R.B.43). The solution to this supposed problem is obvious. All that a prosecutor who wishes to cross examine a defendant on "coaching" needs to do is to ask the trial judge's permission to question the defendant on this subject in the absence of the jury. If such questioning develops any colorable basis for a factual assertion that "coaching" or other discrediting conduct occurred during an attorney-client consultation, the judge can then allow cross examination on the consultation in the jury's presence. If it does not – if, as in the present case, nothing but factually indefensible innuendo is produced – the prosecutor should not be allowed to cross examine on the consultation in front of the jury.

The prosecutor here made no effort to determine whether any sort of improper conduct between Petitioner and his lawyer had occurred during the recess. The prosecutor instead simply accused the Petitioner of being "well coached," then brought out the fact that he had talked to counsel during the recess, as if the fact that he talked to his lawyer was alone sufficient to demonstrate that improper coaching had occurred (J.A.26-9). This was not a cross examination "likely to lead to the discovery of truth." *Perry, id.*, at 601. This was no more than a shoddy trick in which the prosecutor was attempting to mislead the jury into believing it should infer impropriety from the mere fact that Petitioner spoke to his lawyer after obtaining permission from the judge. It is a "when did you stop beating your wife?" type of interrogation that tends to subvert, rather than to enhance, the truth seeking process. A new trial is in order.

## CONCLUSION

Respondents' brief presents weak arguments that would require departure from established precedent in order to affirm Petitioner's convictions and sentence. Based on the facts as they appear in the trial record, and the authorities and arguments cited above, Petitioner's prayer for relief should be granted.

Respectfully submitted,

/s/ Robert J. Link
ROBERT J. LINK
PAJCIC & PAJCIC, P.A.
2800 Independent Square
Jacksonville, Florida 32202
(904) 358-8881
*Attorneys for Petitioner*